

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

**I.T.A. No. 1206/Kol/2018**  
**Assessment Years: 2014-15**

Smt. Ritika Sarogi (PAN: AZOPS8355D)	Vs.	Income-tax Officer, Wd-49(2), Kolkata
Appellant		Respondent

For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Shri Sanjit Kumar Das, Addl. CIT, Sr. DR

Date of Hearing	27.12.2018
Date of Pronouncement	21.02.2019

**ORDER**

**Per Shri A.T.Varkey, JM**

This appeal of the assessee arises out of order of the Learned Commissioner of Income Tax (Appeals) - 15, Kolkata for AY 2014-15 dated 05.03.2018.

2. At the outset itself, the assessee brought to our notice that the assessee is not pressing ground no. 8 which is against the action of Ld. CIT(A) in confirming an addition of Rs.1,54,302/- on account of travelling expenses. So, this ground of appeal of assessee is dismissed.

3. Ground no. 9 is general in nature and also does not require any adjudication, so the same also stands dismissed.

4. In respect of ground Nos. 1 to 7 the main grievance of the assessee is against the action of Ld. CIT(A) in confirming the action of the AO to treat the Long Term Capital Gains (LTCG) of Rs.1,03,72,989/- as bogus and thereby denying the exemption claimed by the assessee u/s. 10(38) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

5. Brief facts of the case as noted by the AO is that the AO during the scrutiny assessment noted that the assessee had claimed LTCG on sale of shares of M/s. Smart Champs IT and Infra Ltd. (Cressanda Solutions Ltd.). According to AO, the assessee purchased 2,00,000 shares of M/s. Smart Champs IT and Infra Ltd. offline on 24.09.2012 investing Rs. 2,00,000/- and sold the entire share of M/s. Cressanda Solutions Ltd. (amalgamated company) between 18.12.2013 to 27.03.2014 for Rs.1,05,72,989/-. Thereafter, the AO took note of the investigation carried out by the Investigation Wing of Kolkata in respect of transaction of shares of penny stock companies carried out at Kolkata Stock Exchange & Bombay Stock Exchange wherein it was found out that artificial gains in the form of LTCG or artificial loss in the form of STCL to the beneficiaries as per their requirements was carried out systematically to evade tax. Thereafter, he discusses the modus operandi as unraveled by the department. It was also noted by the AO that assessee was one of the beneficiaries after the investigation was carried out. The AO noted that despite the financial negativity of the M/s. Cressanda Solutions Ltd, the assessee with the modus operandi using the syndicate/racket was able to pre-arrange sale/purchase of these shares of the said company at a price as high as around Rs.510/- within a gap of 15 months, which per-se cannot be termed as normal behavior and is not acceptable as per the human probabilities. The AO also noted the history of this scrip that M/s. Smart Champs IT and Infra Ltd. got amalgamated with M/s. Cressanda Solutions Ltd. which was not a blue chip company rather it is a penny stock company and, therefore, there was no reason how the share value of M/s. Cressanda Solutions Ltd. can go to astronomical price and assessee was able to get LTCG of such a huge amount, therefore, by applying the human probability concluded that the claim of the assessee of the LTCG from sale of shares of M/s. Cressanda Solutions Ltd. to the tune of Rs.1,03,72,989/- as bogus and, therefore, was treated as assessee's income from undisclosed sources. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same. Aggrieved, the assessee is before us.

6. The Ld. AR assailing the decision of the Ld. CIT(A) drew our attention to the paper book filed by the assessee wherein the assessee had filed the documents to prove that the assessee had purchased the shares of M/s. Smart Champs IT and Infra Ltd. for which contract notes have been filed and later on M/s. Smart Champs IT and Infra Ltd. got amalgamated with M/s. Cressenda Solutions Ltd. as per the Hon'ble High Court's order and later on M/s. Cressenda Solutions Ltd.'s shares were allotted to the assessee which was sold in the Stock Exchange which was evidenced by the contract note as well as the sale consideration have been received by account payee cheques and the shares were held in the de mat account. All these documents according to Ld AR, were filed before the authorities below and drew our attention to page nos. 102 to 120 to prove the LTCG claim made by the assessee. The Ld. AR wondered as to how the Ld. CIT(A) ignored the aforesaid documents and without pointing out any fault in the said documents has turned down the claim of the assessee which action, according to Ld. AR, is arbitrary and perverse. Ld. AR drew our attention to judicial precedents laid down by the Hon'ble jurisdictional High Court as well as by Hon'ble High Courts and Tribunal the decisions in support of the claim made by the assessee wherein similar claim of LTCG has been upheld. The Ld. AR also drew our attention to the Coordinate Bench decision in Navneet Agarwal, L/H of Lt. Kiran Agarwal Vs. ITO, ITA No. 2281/Kol/2017 for AY 2014-15 dated 20.07.2018 wherein the Tribunal was pleased to uphold the LTCG claim of the assessee in respect of sale of scrips of M/s. Cressenda Solutions Ltd. as well as the decision in Suman Saraf Vs. ITO in ITA No. 1395/Kol/2018 dated 05.10.2018 wherein also the Tribunal upheld the LTCG claim of assessee in respect of M/s. Cressenda Solutions Ltd., so he prayed that assessee's claim of LTCG be upheld.

7. Per contra, the Ld. DR while supporting the order of the Ld. CIT(A) drew our attention to the fact that the scrip which was valued Rs. 1/- each before amalgamation with M/s. Cressenda Solutions Ltd. has gone upto Rs.510/- per share within fifteen months is against human probability and the assessee failed to produce any evidence to show that there was any extraordinary event which could have been instrumental in the rise of the shares. According to Ld. DR, the price of share of M/s. Smart Champs IT and Infra Ltd.

which assessee purchased for Rs. 1/- each was also a paper company, which was later amalgamated with M/s. Cressenda Solutions Ltd. was also a penny stock company which had no financial worth-mentioning. So, according to Ld. DR, it is against the human probability that shares could have traded at such a high value earning the assessee huge profit. And the ld. D.R. heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017 to support the orders of lower authorities. According to Ld. DR, Investigation Wing of Kolkata has clearly unraveled the modus operandi followed by these unscrupulous persons/brokers which was systematically carried out with transactions supported by documents cannot be therefore, accepted and, therefore, he does not want us to interfere with the order of Ld. CIT(A).

8. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the appellant had purchased 2,00,000 shares of M/s. Smart Champs IT and Infra Ltd. from M/s. Bolero Commotrade Pvt. Ltd. on 24.09.2012 (page 102 of paper book). Thereafter on 24.01.2013 the Hon'ble Bombay High Court approved the scheme of amalgamation of M/s. Smart Champs IT and Infra Ltd. with M/s. Cressanda Solutions Ltd. As per the scheme of amalgamation M/s. Cressanda Solutions Ltd. was to allow equal number of shares to the shareholders of M/s. Smart Champs IT and Infra Ltd. Pursuant to the said scheme, the assessee received 20000 shares of M/s. Cressanda Solutions Ltd. Thereafter on 15.01.2014, M/s. Cressanda Solutions Ltd. announced a stock split and sub-division of the Rs.10 share into shares of Rs. 1 each. As on that date the assessee had 13,500 shares of face value of Rs. 10/- were converted into 1,35,000 shares. The details of the summary chart showing the details of the share sale are as under:

Sl. No.	Date	No. of shares	Face Value (Rs.)	Sale consideration (Rs.)
1.	18.12.2013	2000	10	10,13,997/-
2.	24.12.2013	2500	10	12,69,618/-
3.	10.01.2014	2000	10	10,17,593/-
4.	20.01.2014	35000	1	18,54,418/-
5.	27.01.2014	20000	1	10,58,668/-
6.	14.02.2014	30000	1	16,16,471/-
7.	07.03.2014	30000	1	16,47,596/-
8.	27.03.2014	20000	1	<u>10,94,628/-</u> <u>1,05,72,989/-</u>

9. We note that the above transaction has been carried out on a recognized stock exchange i.e. Bombay Stock Exchange and through a registered broker i.e. Excel Stock Broking Pvt. Ltd. We note that the transaction has been carried out after paying the STT due on it. We note that the contract notes, de mat account evidencing the share movement, bank account highlighted the payments are furnished in the paper book. We also note that these documents were furnished before the AO as well as before the Ld. CIT(A). We note that during the assessment proceedings, the AO influenced by the report of the Investigation Wing has not expressed his view in respect of the documents filed by the assessee to substantiate her claim and did not point out any defect in the documents provided by the assessee. The assessee in order to prove its bonafideness in the transaction filed the bank statement, invoice of purchase of shares, contract notes for sale of shares, earlier year's Balance Sheet showing the same being reflected as shares as investments etc. We note that during assessment proceedings when the AO expressed doubts about the genuineness of her claim based on the Investigation Report of the Investigation Wing, the assessee requested for a copy of the Investigation Report of the Investigation Wing, which was not furnished to the assessee. It was also brought to the notice of the AO that the assessee an individual was not related in any manner to the promoters or the directors of the company in question or to any person to whom the shares have been sold. The assessee contested the AO's view that M/s. Cressenda Solutions Ltd. was a penny stock company and its stocks were artificially rigged to benefit the assessee. Though the assessee filed all the documents to support its claim for LTCG the AO & Ld. CIT(A) without finding any fault with the documents filed have negated the claim based only on human probability and the Investigation Report which was not furnished to assessee. According to us, the non-furnishing of any material which is used by the AO to draw adverse view against the assessee itself is in violation of Natural Principle. We note that the same issue arose in the case of an assessee named Navneet Agarwal (supra) who also claimed LTCG for sale of shares of M/s. Cressenda Solutions Ltd. which was not accepted by the AO and the Ld. CIT(A), which action was assailed before this Tribunal and this Tribunal in ITA No. 2281/Kol/2017 was pleased to allow the LTCG claim of the assessee by holding as under:

*2.The assessee had filed return of income on 16.07.2014 disclosing total income of Rs. 4,63,515/-. This was processed u/s. 143(1) of the Act and subsequently selected for scrutiny.*

*The assessee had claimed exemption on income from long term capital gains of Rs. 2,18,13,073/-. This gain was earned from sale of fifty thousand shares of M/s Cressenda Solution Ltd., during the financial year 2013-14 relevant to assessment year 2014-15. The Assessing Officer in his order passed u/s. 143(3) of the Act referred to the investigation carried out by the Investigation Wing of the Income Tax Department, Kolkata and at Para. 4, he stated as follows:*

*“4. Before going into the details of this particular case, it is pertinent to discuss the background of the Investigation carried out by the Investigation Wing of the Income Tax Department, Kolkata. For this relevant portions of the Investigation Reports are reproduced herein:*

*In the whole project total 84 BSE listed penny stocks have been identified and worked upon. After that, number of search and surveys were conducted in the office premises of more than 32 shares broking entities, which accepted that they were actively involved in the bogus LTCS/STCL Scam. Surveys were also conducted in the office premises of many accommodation entry providers and their statements recorded. All have accepted their role in the scam.*

*Beneficiaries of more than Rs. 38 thousand Crore have been identified and segregated DGIT(Inv.) wise. Total number of more than 60 thousand PAN numbers of the beneficiaries have been identified, which is being reported to assessment wings through the DGIT’s.*

*This report also covers more than 5000 Shell/Paper companies which are better known as Jamakharchi Companies, which are involved in providing bogus accommodation of various kinds. Statements of most of the Directors were recorded on oath and part of the said report.*

*Later, he stated that M/s Cressenda Solution Ltd. is one of the 84 scrips which were identified by the ‘Directorate of Investigation’, as involved in the scheme of bogus LTCG/STCG and that the name and PAN no. of the assessee is part of list of beneficiaries identified by the Directorate. Thereafter, he discussed the “Modus Operandi” of these companies and held that the total sale consideration earned by the assessee is to be added as unexplained cash credit as these are sale of bogus shares.*

*3. The Modus Operandi listed out by the AO is summarized as follows:*

- i. The initial allotment of shares to beneficiaries is generally done through preferential allotment.*
- ii. The market price of shares of these companies rise to very high level within a span of one year.*
- iii. The trading volume of shares during the period, in which manipulations are done to raise the market price, is extremely thin.*
- iv. Most of the purported investors are returned their initial investment amount in cash. Only small amount is retained by the operator as security. Thus, an enquiry would reveal that most of the capital receipts through preferential allotment or other means would have found their way out of system as cash.*
- v. Most of these companies have no business at all. Few of the companies which have some business do not have the credentials to justify the sharp rise in Market Price of their shares.*

- vi. *The sharp rise in market price of the shares of these entities is not supported by fundamentals of the company or any other genuine factors.*
- vi. *An analysis in respect of persons involved in transactions apparently carried out in order to jack up the share prices has been done in respect of 84 companies. It has been noted that many common persons/entities were involved in trading in more than 1 LTCG companies during the period when the shares were made to rise which implies that they had contributed to such price rise.*
- vii. *Names of most of the LTCG companies are changed during the period of the scam.*
- viii. *Most of the companies split the face value of shares [this is probably done to avoid the eyes of market analysts].*
- ix. *The volume of trade jumps manifold immediately when the market prices of shares reach at optimum level so as to result in LTCG assured to the beneficiaries. This maximum is reached around the time when the initial allottees have held the shares for one year or little more and thus, their gain on sale of such shares would be eligible for exemption from Income Tax.*
- x. *An analysis of share buyers of some of LTCG companies was done to see if there were common persons/entities involved in buying the bogus inflated shares. It was noted that there were many common buyers [which were paper companies].*
- xi. *The prices of the shares fall very sharply after the shares of LTCG beneficiaries have been off loaded through the pre-arranged transactions on the Stock Exchange floor/portal to the Short Term Loss seekers or dummy paper entities.*
- xii. *The shares of these companies are not available for buy/sell to any person outside the syndicate. This is generally ensured by way of synchronized trading by the operators amongst themselves and/or by utilizing the mechanism of upper/lower circuit of the Exchange.*

*The assessee submitted various documents in support of her claim that the transactions in question are genuine. She also relied on certain case laws. The AO did not accept the evidence filed by the assessee in support of her claim and by relying on the report of the investigating wing rejected the claim of the assessee that she had earned capital gains on the genuine sale of shares. He held that the receipt is an unexplained cash credit and made an addition u/s. 68 of the Act. Aggrieved the assessee carried the matter on appeal.*

*4. The First Appellate Authority had given his decision from page 41 of his order. His findings are summarized as follows:*

- a) *The AO had placed on record the entire gamut of finding and there is no further requirement for elaboration.*
- b) *There is direct evidence to clearly indicate that the entire transaction undertaken by the assessee was merely an accommodation taken for the purpose of bogus long term capital gains to claim exempt income. The authorities such as SEBI have after investigating such abnormal price increase of certain stocks, suspended certain scrips.*
- c) *The submissions of the assessee pointed out elaborate documentation such as:*
  - i) *Application of shares.*

- ii) *Allotment of shares.*
- iii) *Share Certificates*
- iv) *Payment by cheques*
- v) *Filings before Registrar of Companies.*
- vi) *Proof of amalgamation of companies.*
- vii) *Copies of bank statement,*
- viii) *Bank contract notes.*
- ix) *Delivery instruction to the broker etc.*

- d) *The elaborate paper book is filed to strengthen the matter relevant to the bogus claim of LTCG, and this is clearly been schemed and pre-planned with malafide intention. Therefore, all these documents are not evidence.*
- e) *The transactions are unnatural and highly suspicious. There are grave doubts in the story propounded by the assessee before the authorities below. Banking documents are mere self-serving recitals.*

*5. Thereafter, he referred to a number of judgments relating to human behavior and preponderance of probabilities and upheld the addition made by the Assessing Officer by relying on what he calls rules of "Suspicious" transactions. Aggrieved the assessee is in appeal before us.*

*6. The ld. Counsel for the assessee reiterated the contentions raised by the assessee before the lower authorities. The sum & substance of his submissions is that the assessee has been allotted fifty thousand equity shares of "Smart Champ IT & Infra ltd", on an application made by the assessee, and the amount in question was paid through banking channels and the name of the assessee was reflected by the company "Smart Champ IT & Infra Ltd." in its return filed before the Registrar of companies as a shareholder in the year 2011-12 and that the assessee had lodged the shares with a depository, with a demat request on 11.02.2012. Further, the Hon'ble Bombay High Court had approved the Scheme of Amalgamation of "Smart Champ IT & Infra Ltd." with a company M/s. "Cressanda Solution ltd.". That in accordance with the scheme of amalgamation the assessee was allotted fifty thousand equity shares of M/s. Cressanda Solution Ltd. and that the documents filed reflected the transaction statement for the period 01.11.2011 to 31.12.2013. It was further submitted that these shares were sold through the broker "SKP Stock Broking Pvt. Ltd." who is a SEBI registered broker and all the evidences in this regard were filed. It was pleaded that the scripts were held for more than 500 days, which proves the bonafide nature of the shareholdings as no sale was done immediately on completion of 365 days. It was submitted that the assessee is not connected with the promoters and has nothing to do with the alleged rigging of shares, if any. Reliance was placed on number of decisions for the proposition that, evidence cannot be discarded by applying theory of human behavior and the theory of preponderance of probabilities.*

*7. On the findings of the Assessing Officer as well as Ld. CIT(A), he submitted as follows:*

- a. *As regards the allegation in respect of artificial rigging up of the price of shares, it is submitted that the ld. A.O. did not provide any documentary evidence of a live link and direct relation to such alleged rigging of prices with the assessee. Hence, no adverse inference could be drawn against the assessee in this regard.*
- b. *That the sale transactions in question had taken place in the stock exchange electronically, through a registered broker SKP Stock Broking Pvt. Ltd. (now Rely bulls Stock Broking Pvt. Ltd.). All such activity of purchase and sale on the platform of the stock exchange are logged*

*in, on real time basis. It is not possible to sell / purchase the shares of any company on the stock exchange in variance to the prevailing market price at any point of time. Hence, the assessee cannot be, nor is supposed to be aware of and know the identity of the persons, who have sold the shares at the time of purchase of the shares by the assessee and purchaser of the shares at the time of sale of the said shares by the assessee at the Stock Exchange.*

- c. It is further submitted that the share price is always determined by the market mechanism at any given point of time because there is a robust system of the stock exchange which is transparent, open and equitable, and the assessee has also sold the shares on such a platform at a price which was a reflection of the market price derived through the interplay of the forces of market demand and supply.*
- d. In the instant case, the assessee is not connected with “Cressanda Solutions Ltd.” or the amalgamated company or their promoters, directors or any other person who exercises any control over Cressanda Solutions Ltd or the amalgamated company or any so-called entry operator. As a matter of fact, the assessee has never indulged in any such questionable activity nor has been part of any modus operandi as stated by the A.O.*
- e. The assessee has transacted in the shares of Cressanda Solutions Ltd. / amalgamated company in the normal course of investment like millions of investors do in the stock market. Therefore, the question of alleged conversion of unaccounted money in the form of alleged bogus long term capital gain with the help of many alleged connected parties through price rigging and price manipulations does not arise.*
- f. The A.O. has drawn an adverse inference in regard to purchases through private placement of shares. It is common knowledge that the management of various companies comes out with private placement of equity shares, of which information is disseminated through market grapevine. Applications are made on that basis and allotment is obtained. There are also market rumours that the shares in question will see a phenomenal rise in the near future. The assessee merely acted on the basis of such market information and happened to get phenomenal gain. It could have been otherwise as well. The rags to riches story in the stock market are a galore. But the scope of downside in this particular scrip was virtually nil as the assessee was getting the shares at the rock bottom price. So, she took a prudent but calculated risk.*
- g. It has been submitted that the alleged circumstances, circumstantial evidence and material has led the A.O. to believe that the real is not the apparent. In the absence of any link between the assessee and the alleged admissions of the directors and brokers, human probability is being used as a vague and convenient medium for the department’s conjectures. Blaming the assessee by vague observations and drawing an adverse inference without any admissible evidence on record, is bad in law, illegal, invalid and void-ab-initio.*
- h. It is further submitted that investment in a company with weak fundamentals can be for several reasons such as professional advice, reasonable price per share, a foreseeable turnaround, past pricing and volume patterns and just market rumour about phenomenal movement in share price of a particular scrip. Moreover, the mere fact that the shares were sold at a high price cannot be termed as conclusive proof or a ground for an allegation that*

*the assessee has converted some unaccounted money through accommodation entries as alleged by the A.O. in the assessment order.*

- i. The Ld. A.O. in the assessment order relied upon the purported statements of various alleged operators on the basis of which the Ld. A.O. had drawn adverse inference in the instant case. It is worthy to note that nowhere any of them has ever named the assessee in the alleged manipulation. Further, the Ld. A.O. did not provide any opportunity to cross examine the said persons. It is a well-settled principle of law that no credence can be given to the statement/report of any person given behind the back of the assessee unless any opportunity to cross examine him is afforded to the assessee.*
- j. That the assessee conducted all the transactions through a recognized share broker and received and made the payments through account payee cheques. It is submitted that the genuine transactions cannot be and should not be treated as ingenuine merely on an arbitrary view of suspicion.*
- k. The A.O.'s contention that the company in question had insignificant business operation, which fact does not support the unprecedented rise in its price is also of no consequence. It is a well-known fact in the stock market that share price movement has very often, no correlation with the fundamentals of the company. The price of any commodity including shares is determined by the market forces of demand and supply of the market players and not by their intrinsic worth.*
- l. The assessee categorically submits that the assessee bonafidely purchased the shares in private placement in anticipation of substantial gain and sold the shares in the online system, when substantial gains materialised. It is submitted that just because the assessee is able to draw benefit out of the rigging of prices done by others in the transactions bonafidely done in the fully legalised system with not a shred of evidence on record to prove the complicity of the assessee in the alleged crime, it is not possible to draw any adverse inference against the assessee.*
- m. The A.O. has also, nowhere in the assessment order referred to any material which can prove the complicity of assessee in the alleged accommodation entry operation. If the assessee has taken advantage of the price rise in an open manner through the transaction conducted in the official online system, no adverse inference can be drawn against the assessee.*

*8. He submitted that the overwhelming documentary and circumstantial evidence has to be considered and not mere suspicion and **preponderance of probabilities**. He relied on a number of case laws, which we would refer to, as and when necessary.*

*9. The ld. DR on the other hand, relied on the order of the assessing officer and reiterated the findings made therein and submitted that the same be upheld. He vehemently argued that merely because the assessee has produced all the evidences required to prove his claim, the same cannot be accepted as these are organized and managed transactions. He took this bench through the modus operandi mentioned by the AO and submitted that in all cases where the shares of these companies are purchased and sold, additions have to be made, irrespective of the evidence produced as there are cases where manipulation has*

*taken place. He reiterated each and every observation and finding of the ld. AO as well as the Ld. CIT(A) and prayed that the same be upheld.*

*10. After careful consideration of the rival submissions, perusal of the papers on record and order of the lower authorities below, as well as case law cited, we hold as follows.*

*11. The assessee in this case has stated the following facts and produced the following documents as evidences:*

- 1. The assessee had made an application for allotment of 50000 equity shares of "Smart champs IT and Infra Ltd." and she was allotted the share on 3<sup>rd</sup> December 2011 (copy of Application form, intimation of allotment and share certificate Paper Book at page 8 to 10).*
- 2. The payment for the allotment of shares was made through an account payee cheque (copy of the bank statement evidencing the source of money and payment made to "Smart Champs IT & Infra Ltd." for such shares allotted is placed in the Paper Book at page no. 11).*
- 3. Annual return no. 20B was filed with Registrar of companies by "Smart Champs IT & Infra Ltd" showing the assessee's name as shareholder (copy of annual return no. 20B filed with Registrar of companies by "Smart Champs IT & Infra Ltd. "is placed in the Paper Book at page no. 12 to 18.)*
- 4. The assessee lodged the said shares with the Depository M/s. Eureka Stock & Share Broking Services Ltd. with a Demat request on 11<sup>th</sup> February, 2012. The said shares were dematerialized on 31<sup>st</sup> March, 2012 (copy of demat request slip along with the transaction statement is placed in the paper book at page no. 19 to 21).*
- 5. On 24.01.2013, the Hon'ble Bombay High Court approved the scheme of amalgamation of "Smart Champs IT and Infra Ltd." with "Cressanda Solutions Ltd." In accordance with the said scheme of amalgamation, the assessee was allotted 50000 equity shares of "M/s. Cressanda Solutions Ltd." The demat shares are reflected in the transaction statement of the period from 1<sup>st</sup> November 2011 to 31<sup>st</sup> December, 2013 (A copy of the scheme of amalgamation along with copy of order of the Hon'ble Bombay High Court and a copy of the letter to this effect submitted by "Cressanda Solutions Ltd". to Bombay Stock Exchange is placed in the Paper Book at page no 22 to 43.)*
- 6. The assessee sold 50000 shares costing Rs. 500000/- through her broker "SKP Stock Broking Pvt. Ltd" which was a SEBI registered broker and earned a Long Term Capital Gain of Rs. 2,18,13,072/-. (Copy of the bank statement, brokers contract note together with the delivery instructions given to the DP and broker's confirmation is also placed in the paper book at page no 44 to 65).*
- 7. Copy of Form No. 10DB issued by the broker, in support of charging of S.T.T. in respect of the transactions appearing in the ledger is placed in the paper book at page no. 66.*
- 8. The holding period of the said scrip is more than one year (above 500 days) through in order to get the benefit of claim of Long Term Capital Gain the holding period is required to be 365 days.*

12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to "Modus Operandi" of persons for earning long term capital gains which is exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assessee. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing.

13. The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee's action giving her involvement in the scam should be established. The allegation implies that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from income tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation's office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

14. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of law laid down by the Courts of law.

15. In our view, just the modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be

*strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence. In this connection we refer to the general view on the topic of conveyance of immovable properties. The rates/sale price are at variance with the circle rates fixed by the Registration authorities of the Government in most cases and the general impression is that cash would have changed hands. The courts have laid down that judicial notice of such notorious facts cannot be taken based on generalisations. Courts of law are bound to go by evidence.*

*16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However, we do not find that the assessing officer as well as the Ld. CIT(A), have brought out any part of the investigation wing report in which the assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated, including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact, the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, in our view, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.*

*17. The Hon'ble Supreme Court way back in the case of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon'ble Court held:*

*“Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or*

*surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each”.*

*The observations of the Hon’ble Apex Court are equally applicable to the case of the assessee. In our view, the assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact, in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence in our view under these circumstances nothing can be implicated against the assessee.*

*18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:*

*a) Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.*

*“23. A Constitution Bench of this Court in State of M.P .v. Chintaman Sadashiva Vaishampayan AIR 1961 SC1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors. ,AIR 1964 SC708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors. AIR 2009 SC 2448; Biecco Lawrie and Anr. v. State of West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha AIR 2010 SC 3131).*

*24. In Lakshman Exports Ltd. v. Collector of Central Excise (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.*

28. *The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.*

29. *In Rajiv Arora v. Union of India and Ors. AIR 2009SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.*

30. *The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.”*

*b) Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II wherein it was held that:*

*“4. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the Assessee, and Mr. K.Radhakrishnan, learned senior counsel who appeared for the Revenue.*

*5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.*

*6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to*

*avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005[2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

*7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice.”*

*19. On similar facts where the revenue has alleged that the assessee has declared bogus LTCG, it was held as follows:*

*a) The CALCUTTAHIGH COURT in the case of BLB CABLES & CONDUCTORS[ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:*

*“.....we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee’s appeal.” [quoted verbatim]*

*This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal’s finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed.”*

*b) The JAIPUR ITAT in the case of VIVEK AGARWAL[ITA No.292/JP/2017]order dated 06.04.2018 held as under vide Page 9 Para 3:*

*“We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account.”*

c) *The Hon'ble Punjab and Haryana High Court in the case of PREMPAL GANDHI [ITA-95-2017(O&M)] dated 18.01.2018 at vide Page 3 Para 4 held as under:*

*"..... The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner."*

*The Court also held the following vide Page 3 Para 5 the following:*

*"Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises."*

d) *The BENCH "D" OF KOLKATA ITAT in the case of GAUTAM PINCHA [ITA No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:*

*"In the light of the documents stated i.e. (I to xiv) in Para 6 (supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the ld. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act."*

*Further in Page 15 Para 8.5 of the judgment, it held:*

*"We note that the ld. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the ld. AR (supra) and have been duly considered by us to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT (A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. CIT (A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We, therefore, direct the AO to delete the addition."*

e) *The BENCH “D” OF KOLKATA ITAT in the case of KIRAN KOTHARI HUF [ITA No. 443/Kol/2017] order dated 15.11.2017 held vide Para 9.3 held as under:*

*“..... We find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the ld. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the ld. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence.*

*It further held as follows:*

*“We note that the ld. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the ld. AR (supra) and have been duly considered to arrive at our conclusion. The ld. DR could not bring to our notice any case laws to support the impugned decision of the ld. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the ld. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We therefore direct the AO to delete the addition.”*

f) *The BENCH “A” OF KOLKATA ITAT in the case of SHALEEN KHEMANI [ITA No.1945/Kol/2014] order dated 18.10.2017 held as under vide Page 24 Para 9.3:*

*“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the ld AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the ld DR could not controvert the arguments of the ld AR with contrary material evidences on record and merely relied on the orders of the ld AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the ld AO to be false or fabricated. The facts of the case and the evidences in support of the assessee’s case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the ld AO was not justified in rejecting the assessee’s claim of exemption under section 10(38) of the Act.”*

g) *The BENCH “H” OF MUMBAI ITAT in the case of ARVIND KUMAR JAIN HUF [ITA No.4682/Mum/2014] order dated 18.09.2017 held as under vide Page 6 Para 8:*

*“..... We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by*

*CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transactions in M/s RamkrishnaFincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A).”*

*h)The Hon’ble Punjab and Haryana High Court inthe case ofVIVEK MEHTA[ITA No. 894 OF2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:*

*“On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed.”*

*i) The Hon’ble Jurisdictional Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Kol/2009 dated 29.04.2009 at para 2 held as follows:*

*“The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”*

*j) The Hon’ble Supreme Court in the case of PCIT vs. Teju Rohit kumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon’ble Gujrat High Court as under:*

*“ It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises.”*

*20. Applying the proposition of law as laid down in the above-mentioned judgments to the facts of this case we are bound to consider and rely on the evidence produced by the*

*assessee in support of its claim and base our decision on such evidence and not on suspicion or preponderance of probabilities. No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the income in question is a bona fide Long Term Capital Gain arising from the sale of shares and hence exempt from income tax.*

*21. Under the circumstances and in view of the above discussion, we uphold the contentions of the assessee and delete the addition in question."*

10. We note that the AO in his assessment order, has tried to explain the modus operandi of so called bogus pre-arranged LTCG, in which he goes on to mention "*The operator asks the beneficiary to deliver the unaccounted cash. Once the unaccounted cash has been delivered by the beneficiary the same is then routed by the operator to the books of various paper/bogus companies which ultimately buy the shares belonging to the companies at high prices*". However, we note that AO failed to expose the wrong doing if any on the part of the assessee by bringing out or unraveling any nexus of assessee/broker with the purchase of shares. Further, we note that AO has not brought any evidence/material to suggest that the appellant knows any of the so-called entry operators/broker/paper companies or they have named the appellant in particular, that they have dealt with the appellant. So, it is upon mere surmise and assumption that AO says that assessee's own unaccounted cash have been given to purchasers in order to claim bogus LTCG.

11. We note that in order to create a tax liability in a case of this nature, the AO has to prove and establish the cash trail and the allegations, particularly in respect of the appellant, which is yet to be proved in the instant case. Similar view has been pronounced by Hon'ble Delhi High Court in the case of Pr. CIT vs Jatin Investment (P) Ltd. wherein it was observed "*A transaction cannot be treated as fraudulent if the appellant has furnished the documentary proof and proved the identity of the purchaser and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) of the Act to verify the genuineness of the claim and cannot proceed on surmises. The AO must establish that cash has changed hands. There is no material or evidence even to suggest that the cheques directly or indirectly emanated from the appellant so that it could be said that the appellants' own money was brought back in the guise of sale proceeds*".

12. In the case of CIT vs. Lavanya Land Pvt Ltd. the Hon'ble Bombay High Court ruled that the allegations made by the authorities have to be supported by actual cash passing hands or actually has changed hands.

13. In the case of DOLARRAI HEMANI vs. ITO, this Tribunal held that the fact that the stock is thinly traded & there is unusually high gain, is not sufficient to treat the LTCG as bogus when all the paperwork is in order. The revenue has to bring material on record to support its findings that there has been collusion/connivance between the Broker & the Appellant for the introduction of unaccounted money.

14. In the case of DCIT Vs. Sunita Khemka, ITAT Kolkata ruled that the AO cannot treat a transaction as bogus only the basis of suspicion or surmises. He has to bring material on record to support his findings that there has been a collusion/connivance between the Broker and the Appellant for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and d-mat statements and account payee cheques cannot be treated as bogus.

15. In the case of KAMALA DEVI S DOSHI VS. ITO ITAT MUMBAI, vide its order dated 22.5.2017 held that statement u/s 131 of the Act implicating Appellant is not sufficient to draw adverse inference where documents in the form of Contract Notes, bank statements, STT payment etc. proves the genuineness of purchase and sale of Penny Stock. Failure to provide cross examination is a fatal error.

16. So, as the facts of the case are very similar, the AO has failed to establish any link and therefore the order is based on surmises, predetermined, solely relying upon the investigation report which is general in nature and no concrete material has been brought on record proving otherwise.

17. The assessee has furnished all evidences in support of the claim of the assessee that it earned LTCG on transactions of his investment in shares. The purchase of shares had been accepted by the AO in the year of its acquisition and thereafter until the same were sold. The off market transaction for purchase of shares is not illegal as was held by the decision of *Co-ordinate Bench of this Tribunal in the case of Dolarraji Hemani vs. ITO in ITA No. 19/Kol/2014 dated 2.12.2016* and *the decision by Hon'ble Calcutta High court in PCIT Vs. BLB Cables & Conductors Pvt. Ltd. in ITAT No. 78 of 2017 dated 19.06.2018 wherein all the transactions took place off market and the loss on commodity exchange was allowed in favour of assessee.* The transactions were all through account payee cheques and reflected in the books of accounts. The purchase of shares and the sale of shares were also reflected in Demat account statements. The sale of shares suffered STT, brokerage etc. In the facts and circumstances of the case, it cannot be held that the transactions were bogus. The following judgments of Hon'ble Jurisdictional High Court:-

(i) The Hon'ble Calcutta High Court in the case of [Principal Commissioner Of Income vs M/S. Blb Cables And Conductors](#); ITAT No.78 of 2017, GA No.747 of 2017; dt. 19 June, 2018, had upheld the order of the Tribunal by observing as follows:-

*"4. We have heard both the side and perused the materials available on record. The ld. AR submitted two papers books. First book is running in pages no. 1 to 88 and 2nd paper book is running in pages 1 to 34. Before us the ld. AR submitted that the order of the AO is silent about the date from which the broker was expelled.*

*There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.*

*4.1 From the aforesaid discussion we find that the assessee has incurred losses from the off market commodity transactions and the AO held such loss as bogus and inadmissible in the eyes of the law. The same loss was also confirmed by the ld. CIT(A). However we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence."*

ii) **M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012] (Cal HC)** – In this case the ld AO found that the formal evidences produced by the assessee to support huge losses claimed

in the transactions of purchase and sale of shares were stage managed. The Hon'ble High Court held that the opinion of the AO that the assessee generated a sizeable amount of loss out of prearranged transactions so as to reduce the quantum of income liable for tax might have been the view expressed by the Id AO but he miserably failed to substantiate that. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the AO was misplaced and not substantiated.

**iii) CIT V. Lakshmangarh Estate & Trading Co. Limited [2013] 40 taxmann.com 439 (Cal)**

– In this case the Hon'ble Calcutta High Court held that on the basis of a suspicion howsoever strong it is not possible to record any finding of fact. As a matter of fact suspicion can never take the place of proof. It was further held that in absence of any evidence on record, it is difficult if not impossible, to hold that the transactions of buying or selling of shares were colourable transactions or were resorted to with ulterior motive.

**iv) CIT V. Shreyashi Ganguli [ITA No. 196 of 2012] (Cal HC)** – In this case the Hon'ble Calcutta High Court held that the Assessing Officer doubted the transactions since the selling broker was subjected to SEBI's action. However the transactions were as per norms and suffered STT, brokerage, service tax, and cess. There is no iota of evidence over the transactions as it were reflected in demat account. The appeal filed by the revenue was dismissed.

**v) CIT V. Rungta Properties Private Limited [ITA No. 105 of 2016] (Cal HC)** – In this case the Hon'ble Calcutta High Court affirmed the decision of this tribunal, wherein, the tribunal allowed the appeal of the assessee where the AO did not accept the explanation of the assessee in respect of his transactions in alleged penny stocks. The Tribunal found that the AO disallowed the loss on trading of penny stock on the basis of some information received by him. However, it was also found that the AO did not doubt the genuineness of the documents submitted by the assessee. The Tribunal held that the AO's conclusions are merely based on the information received by him. The appeal filed by the revenue was dismissed.

**vi) CIT V. Andaman Timbers Industries Limited [ITA No. 721 of 2008] (Cal HC)** – In this case the Hon'ble Calcutta High Court affirmed the decision of this Tribunal wherein the loss suffered by the Assessee was allowed since the AO failed to bring on record any evidence to suggest that the sale of shares by the Assessee were not genuine.

**vii) CIT V. Bhagwati Prasad Agarwal [2009- TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.4.2009]** – In this case the Assessee claimed exemption of income from Long Term Capital Gains. However, the AO, based on the information received by him from Calcutta Stock Exchange found that the transactions were not recorded thereat. He therefore held that the transactions were bogus. The Hon'ble Jurisdictional High Court, affirmed the decision of the Tribunal wherein it was found that the chain of transactions entered into by the assessee have been proved, accounted for, documented and supported by evidence. It was also found that the assessee produced the contract notes, details of demat accounts and produced documents showing all payments were received by the assessee through banks. On these facts, the appeal of the revenue was summarily dismissed by High Court.

18. We note that since the purchase and sale transactions are supported and evidenced by Bills, Contract Notes, Demat statements and bank statements etc., and when the transactions of purchase of shares were accepted by the Id AO in earlier years, the same could not be treated as bogus simply on the basis of some reports of the Investigation Wing and/or the

orders of SEBI and/or the statements of third parties. In support of the aforesaid submissions, the Id AR, in addition to the aforesaid judgements, has referred to and relied on the following cases:-

- (i) *Baijnath Agarwal vs. ACIT – [2010] 40 SOT 475 (Agra (TM))*
- (ii) *ITO vs. Bibi Rani Bansal – [2011] 44 SOT 500 (Agra) (TM)*
- (iii) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agra/2009 (Agra ITAT)*
- (iv) *ACIT vs. Amita Agarwal & Others – ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (v) *Rita Devi & Others vs. DCIT – IT(SS)A Nos. 22-26/Kol/2p11 (Kol ITAT)*
- (vi) *Surya Prakash Toshniwal vs. ITO – ITA No. 1213/Kol/2016 (Kol ITAT)*
- (vii) *Sunita Jain vs. ITO – ITA No. 201 & 502/Ahd/2016 (Ahmedabad ITAT)*
- (viii) *Ms. Farrah Marker vs. ITO – ITA No. 3801/Mum/2011 (Mumbai ITAT)*
- (ix) *Anil Nandkishore Goyal vs. ACIT – ITA Nos. 1256/PN/2012 (Pune ITAT)*
- (x) *CIT vs. Sudeep Goenka – [2013] 29 taxmann.com 402 (Allahabad HC)*
- (xi) *CIT vs. Udit Narain Agarwal – [2013] 29 taxmann.com 76 (Allahabad HC)*
- (xii) *CIT vs. Jamnadevi Agarwal [2012] 20 taxmann.com 529 (Bombay HC)*
- (xiii) *CIT vs. Himani M. Vakil – [2014] 41 taxmann.com 425 (Gujarat HC)*
- (xiv) *CIT vs. Maheshchandra G. Vakil – [2013] 40 taxmann.com 326 (Gujarat HC)*
- (xv) *CIT vs. Sumitra Devi [2014] 49 Taxmann.com 37 (Rajasthan HC)*
- (xvi) *Ganeshmull Bijay Singh Baid HUF vs. DCIT – ITA Nos. 544/Kol/2013 (Kolkata ITAT)*
- (xvii) *Meena Devi Gupta & Others vs. ACIT – ITA Nos. 4512 & 4513/Ahd/2007 (Ahmedabad ITAT)*
- (xviii) *Manish Kumar Baid ITA 1236/Kol/2017 (Kolkata ITAT)*
- (xix) *Mahendra Kumar Baid ITA 1237/Kol/2017 (Kolkata ITAT)*

19. The Id AR also brought to our notice that once the assessee has furnished all evidences in support of the genuineness of the transactions, the onus to disprove the same is on revenue. He referred to the judgement of *Hon'ble Supreme Court in the case of Krishnanand Agnihotri vs. The State of Madhya Pradesh [1977] 1 SCC 816 (SC)*. In this case the Hon'ble Apex Court held that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and the burden has to be strictly discharged by adducing evidence of a definite character which would directly prove the fact of benami or establish circumstances unerringly and reasonably raising inference of that fact. The Hon'ble Apex Court further held that it is not enough to show circumstances which might create suspicion because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. The Id AR submitted that similar view has been taken in the following judgments

while deciding the issue relating to exemption claimed by the assessee on LTCG on alleged Penny Socks.

- (i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*
- (ii) *ACIT vs. J. C. Agarwal HUF – ITYA No. 32/Agr/2007 (Agra ITAT)*

20. Moreover it was submitted before us by Id AR that the AO was not justified in taking an adverse view against the assessee on the ground of abnormal price rise of the shares and alleging price rigging. It was submitted that there is no allegation in orders of SEBI and/or the enquiry report of the Investigation Wing to the effect that the assessee, the Companies dealt in and/or his broker was a party to the price rigging or manipulation of price in CSE. The Id AR referred to the following judgments in support of this contention wherein under similar facts of the case it was held that the AO was not justified in refusing to allow the benefit under section 10(38) of the Act and to assess the sale proceeds of shares as undisclosed income of the assessee under section 68 of the Act :-

- (i) *ITO vs. Ashok Kumar Bansal – ITA No. 289/Agr/2009 (Agra ITAT)*
- (ii) *ACIT vs. Amita Agarwal & Others - ITA Nos. 247/(Kol)/ of 2011 (Kol ITAT)*
- (iii) *Lalit Mohan Jalan (HUF) vs. ACIT – ITA No. 693/Kol/2009 (Kol ITAT)*
- (iv) *Mukesh R. Marolia vs. Addl. CIT – [2006] 6 SOT 247 (Mum)*

21. We note that the Id. D.R. had heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Bimalchand Jain in Tax Appeal No. 18 of 2017. We note that in the case relied upon by the Id. D.R, we find that the facts are different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the Id. DR, the dispute was whether the profit earned on sale of shares was capital gains or business profit.

22. In the light of the documents filed by the assessee before the AO/Ld. CIT(A) and before us, which could not be controverted by any material by AO, so respectfully following

the ratio laid by the Hon'ble jurisdictional High Court and other High Courts and the ratio laid by the Hon'ble Supreme Court and this Tribunal, and the decision in the case of Navneet Agarwal (supra) wherein the claim of LTCG for sale of shares of M/s. Cressenda Solutions Ltd. which was allowed by the Tribunal. Respectfully following the same, we allow the claim of the assessee in respect of Long Term Capital Gain in respect of sale of shares of M/s. Cressanda Solutions Ltd and direct deletion of addition of Rs.1,03,72.989/-. Grounds of appeal of assessee challenging the addition made on this issue are allowed.

23. In the result, the appeal of assessee is partly allowed.

Order is pronounced in the open court on 21/02/2019

Sd/-  
(Dr. A. L. Saini)  
Accountant Member

Sd/-  
(A. T. Varkey)  
Judicial Member

Dated: 21st February, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Smt. Ritika Sarogi, 339, Canal Street, Shree Bhumi, Kolkata-700048.
- 2 Respondent –ITO, Ward-49(2), Kolkata.
- 3 CIT(A)-15, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Assistant Registrar